IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIGINAL SIDE

APPEAL NO.164 OF 1996
IN
SUIT NO.630 OF 1977

Chandrakant Kanoji Parab, an
Indian Inhabitant of Bombay
occupation business, residing
at Chandan Mansion, Second floor,
Room No.31, Gokhale Road, North,
Opposite Portugese Church, Dadar,
Bombay 400 028. Appellant
(original plaintiff)

vs.

Sakharam Raoji Parab
since deceased by LRS.

1(a) Ramesh Sakharam Parab,
Indian Inhabitant, residing
at Prarthana Society Building,
Flat No.7, Barrel Road,
Gokhale Road, North Near Kamgar
Park, Dadar, Bombay 400 028.

1(b) Shubhangi Shivram Dalvi
At & post: Bingoli,
Shetkarwadi, Taluka:Kudal
District: Sindhudurga.

1(c) Madhavi Keshav Sawant
Maharashtra Housing Board
Building No.1, Room No.16,
1st floor, Tagore Nagar,
Vikhroli, Bombay 400 083.

1(d) Neelima M. Mahale
Ravindra Dhuruwadi,
Near Eagle Nursing Home,
Cadel Road, Opp.Siddhi
Vinayak Mandir,
Mumbai 400 028. Respondent
(original defendant)

Mr.M.S.Sanghvi, Senior counsel with Mr.C.P.Deogirikar
for the appellant.

None for the respondents.

**CORAM : R. M. LODHA &**
**J.P. DEVADHAR,JJ**.

**DATED : 26th July 2005**

**ORAL JUDGMENT (Per R.M.Lodha,J.)**

The present appeal is at the instance of the plaintiff.

2. The learned trial Judge by his judgment dated 7th June 1995 dismissed the plaintiff's suit for recovery of possession of the business being M/s.Ramesh Electric works and the premises where the said business is being carried on by the defendant. The plaintiff's prayer that the defendant be directed to pay to the plaintiff the profits/receipt/income/rent of the subject business and the premises where such business was being carried out and the damages were also declined by the learned trial Judge.

3. The facts may be briefly summarised for better appreciation of the controversy between the parties.

4. According to the plaintiff he is sole proprietor of the business being carried on in the name and style of M/s.Ramesh Electric Works. The plaintiff averred that he began the said business on small scale in or about

the year 1966 at the Rameshwar Society premises. Later on with the increase in the business he acquired the premises at Sanjay Society building. The original defendant Sakharam Raoji Parab was his brother in law. The original defendant is dead and represented by the present respondents. It is plaintiff's case that the defendant was employed with M/s.Raghuvanshi Mills. As the plaintiff's business started growing the defendant began rendering part time assistance. In the month of August 1975 the defendant left the job with M/s.Raghuvanshi Mills and joined the plaintiff's employment in his business as a full time general assistant. In the month of October 1976 the defendant took forcible possession of the plaintiff's said business and the premises. Some correspondence and the notices were exchanged between the parties. On 6th May 1977 the plaintiff filed the suit for diverse reliefs.

5. The defendant contested the plaintiff's claim. In the written statement the defendant averred that he was in the employment of M/s.Raghuvanshi Mills as the electric motor winder in the year 1948. With the permission of the management he was undertaking electric motor rewinding jobs on labour contract basis. Initially the defendant used to carry on jobs on site of the customers concerned. The plaintiff is the brother of the defendant's wife. In other words, the plaintiff

is his brother in law. The plaintiff came to Bombay in the year 1958 for appearing in the S.C.C. examination. After passing S.S.C. examination, the father of the plaintiff requested the defendant to find out some employment for the plaintiff. At the defendant's request, the plaintiff got employment with M/s.Raghuvanshi Mills in the year 1960 as a coolie on the basic salary of Rs.30/- per month. The plaintiff was kept under the personal supervision of the defendant in the Mills Electrical maintenance Department. The plaintiff continued to work as coolie for about 4 years in the Raghuwanshi Mills during which period the defendant trained the plaintiff in the art of winding of electric motors. Later on at the request of the defendant, the plaintiff was employed at Edward Mills as winder. In the year 1962 the defendant took on rent a small premises at Byculla at a monthly rent of Rs.100/-. The defendant commenced his rewinding work in the evening hours at the said premises at Byculla in the name and style of M/s.Ramesh Electric Works. The defendant continued to work his business in the name of M/s.Ramesh Electric Works in the premises at Byculla after beginning of the year 1964. In view of the objections of the Bombay Municipal Corporation, the defendant shifted his business to alternate accommodation at Dadar and continued to carry on the business in the name and style of M/s.Ramesh Electric

Works as his own proprietory business. Then again there was some problem with the Municipal authorities and the defendant shifted his business of Ramesh Electric Works at Rameshwar Cooperative Housing Society, Worli, Mumbai in the month of May 1966. The said premises were found inadequate and, therefore, the business was shifted to Sanjay Housing Society since the year 1977 at 6-A, Sanjay Housing Society, Prabhadevi. The defendant averred that he set up the business in the name and style of Ramesh Electric Works as a sole proprietor in the month of February 1962 and continue to carry on business. The plaintiff throughout was an employee of the defendant. The defendant resigned from the full time job of M/s.Raghuvanshi Mills from 1st October 1975 with a view to devote full time attention to his business of Ramesh Electric Works. The defendant denied plaintiff's claim in the business of Ramesh Electric Works.

6. In the light of the pleadings of the parties, the trial Judge framed as many as 11 issues.

7. The plaintiff examined himself and also examined (1) Shri Sridhar Ramchandra Gite, (2) Anand Shriram Dev and (3) Rajaram Ramchandra Chalke.

8. The defendant did not lead any oral evidence but

produced documents in the cross-examination of the plaintiff to demolish the plaintiff's claim and support his own case as set up in the written statement.

9. The learned trial Judge concluded that the defendant has been in possession of the business of Ramesh Electric Works and of the premises in his own right as proprietor and that the defendant has not forcibly or otherwise taken possession of the business or the premises from the plaintiff. The trial Judge held that the defendant did not physically prevent the plaintiff from entering upon the business premises and that the plaintiff is not entitled to carry out business in the name and style of Ramesh Electric Works or as proprietor thereof. In the backdrop of these findings, the learned trial Judge dismissed the plaintiff's suit vide his judgment dated 7th June 1995.

10. Mr.M.S.Sanghvi, the learned senior counsel for the appellant-plaintiff criticising the judgment of the learned trial Judge submitted that from the evidence on record, oral as well as documentary, it was clearly established that the plaintiff was the sole proprietor of the subject business and the property annexed to the said business. He referred to the firm's income tax assessment notices and orders, the record of the operation of the Bank account in respect of the subject

business, the record of plaintiff's dealings with the telephone, electricity supply, shop registration and books of account and the other documents available on record and submitted that the said documents bear out the plaintiff's claim that he is the sole owner of the subject business being carried on in the name and style of M/s.Ramesh Electric Works and that the plaintiff has been accepted and recognised by various persons and authorities alike as the sole proprietor of the subject business and the exclusive owner of the suit property. The learned senior counsel would urge that the fact that the defendant could not dare step into the witness box and avoided himself from being cross-examined by the plaintiff would clearly show the falsity of the case set up by him in the written statement. If there was any iota of substance in the case of the defendant, he would have surely stepped into the witness box. The learned senior counsel submitted that the findings recorded by the learned trial Judge suffer from serious infirmity and need to be corrected in the appeal. He, therefore, prayed that the impugned judgment be set aside and the plaintiff's suit be decreed.

11. Nobody has appeared for the respondents.

12. The main question that falls for consideration in this appeal is whether the plaintiff was carrying on

business of electrical equipment repairs and the electrical motor rewinding in the firm name and style of Ramesh Electric Works as the sole proprietor at shop no.47, Rameshwar Society Building and later on at 6-A in Sanjay Society Building. If the answer to this question is in affirmative, the other question is whether the defendant forcibly dispossessed the plaintiff from the said business and the premises in the month of October 1976 as alleged.

13. We thoughtfully reflected over the rival case of the parties and considered the oral as well as documentary evidence on record.

14. The following facts are clearly borne out from the record:

(i) That the plaintiff is the brother in law of the defendant. The defendant's sister is married to the plaintiff.

(ii) That Ramesh is the son of the defendant. There is no person by name Ramesh in the family of the plaintiff.

(iii) That it was the defendant who started business of rewinding of motor etc. in the name and style of M/s.Ramesh Electric Works in the year 1962.

(iv) That the premises at the Rameshwar Society Building where the business of Ramesh Electric Works was earlier carried on belong to the defendant.

(v) That the defendant was employed with Raghuvanshi Mills as electric motor winder. In the year 1960 the defendant got the plaintiff employed with Raghuvanshi Mills as Coolie and the plaintiff remained under the personal supervision of the defendant in the Mills electrical department.

(vi) That the receipts of the payment of rent in respect of premises of Sanjay Society Building were produced by the defendant and the plaintiff was confronted in this regard in the cross-examination.

15. In the backdrop of the aforesaid facts which have emerged from the record, the plaintiff's case that he is the sole proprietor of the firm Ramesh Electric Works and that the defendant was his employee hardly merits acceptance. It is true that the plaintiff proved that the Bank account of the firm Ramesh Electric Works was opened by him with Bank of India, Prabhadevi Branch. It is also true that the income-tax returns of Ramesh Electric Works for many years were filed by the

plaintiff and it is he who produced notices, assessment orders and the advance tax challans. But the question is whether the aforesaid evidence proves the sole proprietorship of the plaintiff of the firm Ramesh Electric Works. Surely not. The learned trial Judge was right in observing that the assessment orders came to be passed on the basis of the return filed by the plaintiff and are of not much help in proving plaintiff's sole-proprietorship. So is the case with regard to the Bank account opening form. These documents are in the nature of creating evidence in one's own favour.

16. The various entries in the cash book of which detailed reference has been made by the learned trial Judge and that we need not repeat would show that the plaintiff was in employment of the defendant and that the plaintiff was paid wages from time to time. The receipts in respect of payment of rent made to the owner of the premises at Sanjay Society Building were produced by the defendant and from the receipts so produced, it is amply proved that the defendant made the payment of the rent in respect of the said premises until December 1976. The submission of the learned senior counsel for the plaintiff that since the plaintiff was forcibly dispossessed and, therefore, the receipts lying in the shop came in the possession of the defendant does not

merit acceptance. If it was so the least expected of the plaintiff was to inform the owner that he has been forcibly dispossessed by the defendant and that the rent receipts which were left in the premises have been taken by the defendant. Rather the plaintiff admitted in his cross-examination that he did not inform the owner about his dispossession by the defendant. The plaintiff did not make any police complaint either in this regard. That shows that the plaintiff's case as set up in the plaint is malicious and afterthought.

17. It is pertinent to note that the plaintiff claims to have started his business in the name of Ramesh Electric Works somewhere in the year 1966 in the premises owned by the defendant at a monthly rent of Rs.120/- per month. However, not a single receipt has been produced by the plaintiff about the payment of rent to the defendant. There is no document evidencing the transfer of business that was being carried on by the defendant in the name and style of Ramesh Electric Works in favour of the plaintiff in the year 1966. The plaintiff miserably failed to establish that defendant was employed by him as full time general assistant in the month of August, 1975.

18. It is true that the defendant did not step into the witness box but that does not mean that the plaintiff's

case must be accepted as was strongly canvassed by the learned senior counsel. As a matter of fact in the written statement itself, the defendant in respect of his case set out in the written statement stated that he would rely upon the documents relied upon by the plaintiff in the plaint. The burden was on the plaintiff that he was sole proprietor of the business Ramesh Electric Works that he miserably failed to prove. The case of the plaintiff has been demolished completely in his cross-examination by the documents produced by the defendant during plaintiff's cross examination. In this background if the defendant did not choose to examine himself in the witness box, there was nothing wrong in it. All in all we find ourselves in the complete agreement with the consideration and appreciation of the evidence by the learned trial Judge. In the circumstances, the dismissal of the suit by the learned trial Judge cannot be faulted.

19. The appeal has no merit and is dismissed with no order as to costs.

**(R.M. LODHA,J.)**

**(J.P. DEVADHAR,J.)**